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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978
No. 78-1577

SEARS ROEBUCK AND CO.,
a corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES and
CITY OF COMPTON,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

		Page
Table of Authorities		ii
QUESTIONS PRESENTED		1
STATEMENT OF THE CASE		3
THE REASONS FOR GRANTING THE WRIT SUBMITTED BY PETITIONER ARE INADEQUATE		4
THE OPINION BELOW IS CORRECT		6
A.	CONGRESSIONAL CONTROL OF COMPETITION	6
B.	FEDERAL CONTROL OF THE FOREIGN-DOMESTIC DICHOTOMY	8
C.	A STATUTE BASED UPON A CONSTITUTIONAL IMMUNITY MUST STILL BE CONSTITUTIONAL	10
D.	WHETHER THE STATE HAS DISCRIMINATED AGAINST ANY PARTICULAR ENTERPRISE IS NOT RELEVANT TO THE QUESTION OF THE EXISTENCE OF ITS POWERS	12

E. THE 3% DIFFERENTIAL IS NOT INSIGNIFICANT 13

APPENDICES

TABLE OF AUTHORITIES

Cases

Allied Stores of Ohio v. Bowers,
358 U.S. 522, 3 L.Ed.2d 480,
79 S.Ct. 437 (1959) 4

Bethlehem Steel Corp. v. Dept. of Water and Power,
276 Cal.App.2d 221,
80 Cal.Rptr. 800 (1969)
hrg. den. 9

Boston Stock Exchange v. State Tax Commission,
429 U.S. 318, 50 L.Ed.2d 514,
97 S.Ct. 599 (1977) 12, 13

De Canas v. Bica,
424 U.S. 351, 47 L.Ed.2d 43,
96 S.Ct. 933 (1976) 9

Empressa Siderurgica v. County of Merced,
337 U.S. 154, 93 L.Ed. 1276,
69 S.Ct. 995 (1949) 3

Hines v. Davidowitz,
312 U.S. 52, 85 L.Ed. 581,
61 S.Ct. 399 (1941) 9

Japan Line Ltd v. County of Los Angeles,
77-1378
(1979) 9, 13

Low v. Austin,
80 U.S. (13 Wall.) 29 (1872) 2, 10

Michelin Tire Corp. v. Wages,
423 U.S. 276 (1976) 2

Nat'l Soc. of Professional Engineers v. U.S.,
435 U.S. 679, 55 L.Ed.2d 637,
98 S.Ct. 1355 (1978) 7

Standard Oil Co. v. Federal Trade Commission,
340 U.S. 231, 95 L.Ed. 239,
71 S.Ct. 240 (1951) 7

Constutition

United States Constitution:

Art. I, §8, Cl. 3 12

Art. VI, Cl. 2
(Supremecy Clause) 11

Statutes

Revenue and Taxation Code:

Section 225 1, 2, 3, 5, 9, 10, 12

Section 233 3

Section 253.10 3

19 U.S.C. §§1202, et seq. (Tariff Act of 1930) 8

19 U.S.C. §§2101, et seq. (Tariff Act of 1974) 8

Textbooks & Periodicals

Baytagh, Ten Years of Non-Retroactivity: A Critique and Proposal, 61 Va. L. Rev. 1557 (1975) 11

Isaacs, Business, Government and Public Policy, Princeton, N.J. 1964, pp. 380, et seq. 8

Lindholm, Public Finance and Fiscal Policy (New York, 1950) p. 274 7

Adam Smith, Wealth of Nations (London 1776), Book V, Ch. II, Part 2 7

Wall Street Journal of March 29, 1978 13

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The opinion below and the grounds upon which Petitioner relies for jurisdiction are fully set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

The Respondents believe that a failure to understand the impact of Revenue and Taxation Code §225 has resulted in an inaccurate

statement of the questions presented by Petitioner.

In the first question, the statute is described as "valid when enacted." This is not necessarily true since §225 actually immimized goods whose original packages were opened. Goods being repackaged would be exempt under the statute if they were sold to an out-of-state customer. But they definitely had no immunity under Low v. Austin, 80 U.S. (13 Wall.) 29 (1872). Thus the state-mandated favortism for foreign goods resulted from the statute even before Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) was handed down by this Court, although not to the same extent as afterwards.

The questions presented should therefore read:

1. Is a state exemption expanding a constitutional immunity to be deemed constitutional on the basis of the immunity alone, and does the situation change when the immunity is made totally inapplicable to the situation?

2. Is a state capable of distinguishing between types of interstate commerce in an attempt to induce a retention, or increase, of business within its borders?

3. In striking down a statute because it invades a power given to Congress, must a court have evidence of discrimination between businesses?

The statute involved is attached to the Petition as Appendix "B." Revenue and Taxation Code §253.10, relied on by the court below for its interpretation of the exemption is attached hereto as Appendix "A."

STATEMENT OF THE CASE

The Petitioner's statement of the case appears to contain some statements which are open to question.

The statute's purpose was clearly not to resolve the question of taxation of containerized imports. That issue was resolved just 13 days before the California governor's signing of §225, when he signed Revenue and Taxation Code §233 entitled "GOODS IMPORTED IN CONTAINERS." (See Appendix "B".)

Thus, there are only two possible conclusions to reach regarding §225; it was meant to exempt goods (1) when they were being repackaged and (2) when they were in transit.

It is also clear that those exports which were coming from other states could also receive favored treatment under §225, since exports were not subject to the original package concept (see Empressa Siderurgica v. County of Merced, 337 U.S. 154, 155-157, 93 L.Ed. 1276, 69 S.Ct. 995 (1949)).

The Petitioner also indicates that Respondents believed that the statute was being incorrectly interpreted by taxpayers but did not specifically raise the idea that the statute was unconstitutional. As indicated by the Respondents' briefs below, the unconstitutionality of the importers' interpretation has always been one principle reason for differing with that interpretation. In any case, the Petitioner's claim is not followed by any proposed result, and one must assume that the Petitioner brings it up here for its psychological effect on this Court.

THE REASONS FOR GRANTING THE WRIT SUBMITTED BY PETITIONER ARE INADEQUATE

Obviously, the Petitioner is relying on the importance of the issue as its ground for urging this Court to grant the Writ of Certiorari. But in doing so, the Petitioner has overstated the case. Implicit in the Petitioner's remarks are the ideas (1) that Allied Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959) is contrary to the opinion below, and (2) that all of the states' "further shipment" exemptions are in jeopardy.

(1) There is no doubt that the broad issue of whether a state can discriminate between competitors and competing goods is important. It is briefly discussed, infra. But although one can read that issue into the opinion below,

it is not taken up there.

(2) Although other states' "further shipment" exemptions do discriminate against manufacturers having facilities within their borders, neither the Petitioner nor the fellow taxpayer in the companion case, Zee Toys, Inc. v. County of Los Angeles, pointed out one such statute which actually redefines the adjustment Congress has made between foreign and other states' goods. Revenue and Taxation Code §225 is unique in this respect.

As a result, the Petitioner's argument, resting, as it must, on the alleged far-reaching effect of this case, does not support its claim for a hearing by this Court.

There is a further reason for denying the Writ. Those interested in retaining the exemption have sponsored the introduction of a bill in the California Legislature which would substantially alter Revenue and Taxation Code §225. The same benefit would be given to foreign goods, but would also extend to all other goods manufactured in other states. Thus, the discrimination would be between (a) interstate commerce in foreign and non-California goods on the one hand, and (b) interstate commerce in California goods on the other. Although the respondents believe that the new statute is invalid for the same reasons as the old one, it would appear that the Legislature may eliminate the future impact of the former wording. A copy of the proposed legislation is attached

hereto as Appendix "C."

THE OPINION BELOW IS CORRECT

Although the opinion below restricted its discussion to the narrow issue of discriminatory treatment of domestic commerce as opposed to foreign commerce, the broader issue of the ability of the States to regulate commerce when they regulate their economies is present. But Congress' regulation of competition generally, as well as foreign competition in particular, is complete. Attempts to create exemptions for one business or a group of businesses, and not for its competitors, in order to alter patterns of interstate commerce are simply not appropriate.

A. CONGRESSIONAL CONTROL OF COMPETITION

The Petitioner seeks the advantage of a statute which, when enacted, would allow it 3½% pricing leeway in reduced costs as compared with companies selling U.S. products. It has been held by this Court, as well as by Congressional legislation that,

> "Price is the 'central nervous system of the economy.' United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59, 84 L.Ed.

> 1129, 60 S.Ct. 811, and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face. United States v. Container Corp., 393 U.S. 333, 337, 21 L.Ed.2d 526, 89 S.Ct. 510." Nat'l Soc. of Professional Engineers v. U.S., 435 U.S. 679, 55 L.Ed.2d 637, 650, 98 S.Ct. 1355 (1978)(emphasis added).

And further that,

> "The heart of our national economic policy long has been faith in the value of competition." (Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248, 95 L.Ed. 239, 71 S.Ct. 240 (1951).

Yet the Petitioner claims that it may have this advantage over competing goods and that it is proper for a State to give it to it. It suggests that an effort to control interstate and foreign commerce so as to create a flow of goods through the State is a proper reason for operating contrary to the general economic rule of equality (see Adam Smith, Wealth of Nations (London 1776), Book V, Ch. II, Part 2 and Lindholm, Public Finance and Fiscal Policy (New York, 1950) p. 274). But interference with such Congressional authority will create the spectre of 50 different economic regulatory systems which are free to change the balance set by Congress. The Federal Government cannot operate effectively under a system which, instead

of leaving the powers of each level of government intact and complete, constitutionally allows the states to counteract the effect of economic regulations of the Federal Government.

This case presents a prime example of that sort of "system."

B. FEDERAL CONTROL OF THE FOREIGN-DOMESTIC DICHOTOMY

The Tariff Act of 1930 (19 U.S.C. §§1202, et seq.) sets up a whole structure of value-added taxes designed to protect American industry and gather federal revenues (see Isaacs, Business, Government and Public Policy, Princeton, N.J. 1964, pp. 380, et seq.). The Tariff Act of 1974 (19 U.S.C. §§2101, et seq.) also serves an "equalizing" purpose, putting foreign industry, with varying cost factors, on an even level with American industry.

As was pointed out below, the tools given to the President, to adjust the level of foreign prices have been utilized (see Appellants' Opening Brief below, Exhibit B and The Wall Street Journal, March 29, 1978).

The Petitioner seeks to re-adjust the Tariff Acts so as to achieve an effective 3½% reduction in the alignment of foreign and domestic goods prescribed by Congress. (The tax rate for the year in question was approximately 3 to 3½%.)

As this Court is aware, it is the Respondents' position that once foreign enterprises are allowed to operate in this country, the States should not differentiate between them and domestic enterprises (see Respondents' Brief in Japan Line Ltd v. County of Los Angeles, 77-1378). The states should not add to or take away from the privilege allowed by Congress. But the conditions upon which entry is made are particularly within the competence of the Federal Government and the states may not add or take away from them by adding regulations of its own (see Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399 (1941) and De Canas v. Bica, 424 U.S. 351, 47 L.Ed.2d 43, 96 S.Ct. 933 (1976)).

It may be argued that this Court altered that rule in its decision in Japan Line Ltd v. County of Los Angeles, No. 77-1378 (1979). It may be argued that, since an automatic preference for certain foreign-originating property is now constitutionally mandated, Rev. & Tax Code §225 is simply another similar mandate and is valid as a result. Of couse, the difference is that the States themselves have no inherent power to treat foreign and domestic enterprises differently as that would be contrary to the ability of the national government to "speak with one voice" (Japan Lines, supra, Slip Opin. at p. 15-17). Also see Bethlehem Steel Corp. v. Dept. of Water and Power, 276 Cal.App.2d 221, 80 Cal.Rptr. 800 (1969) hrg. den.

The Federal Government has determined the conditions upon which foreign goods will enter this country. By discriminating between foreign and United States goods (or between some foreign goods and some United States goods), Revenue and Taxation Code §225 counteracts the effect of the carefully drawn tariffs established by Congress and the President.

C. A STATUTE BASED UPON A CONSTITUTIONAL IMMUNITY MUST STILL BE CONSTITUTIONAL

The Petitioner argues that, first, that §225 conforms to Low v. Austin, supra, and, second, because of that, the section still retains validity after that case was overruled.

Even assuming that Rev. & Tax Code §225 did conform to Low v. Austin, supra, there is no logical reason to assume that the States may individually retain constitutional immunities by means of statute, if those immunities, as interpreted, violate other constitutional principles. In other words, the Low v. Austin concept is no longer a part of the constitution. It is no longer entitled to the same deference as it was when it was thought to be actually a part of the Constitution. That concept must pass muster like any other state statute, and although entitled to deference, it is not to be treated as equal to other constitutional provisions, but subordinate to them.

The Petitioner's argument on this point runs into other logical flaws. It contends that because the statute was enacted before the change in constitutional interpretation, it should automatically continue in effect. This sort of discrimination against interstate commerce could then continue indefinitely, but only in those states previously practicing it. Such a rule would simply abrogate the authority of the Constitution itself, contrary to the Supremecy Clause (Art. VI, Cl. 2).

This Court has recently inquired into the retroactive impact of its decisions which overrule former constitutional interpretations (see Baytagh, Ten Years of Non-Retroactivity: A Critique and Proposal, 61 Va. L. Rev. 1557 (1975)). Implicit in this Court's decisions on this point is the idea that overruling decisions do change the law. Petitioner argues that the change does not occur if a state has enacted a statute conforming to the former rule. It is difficult to conceive of a concept more inimical to the rights of the people than this one. Changes in criminal and civil rights would be impossible under such a system.

It bears pointing out once again that the Petitioner's proposal would simply stop all constitutional inquiry into a statute originally conforming to an earlier interpretation of a constitutional provision.

D. WHETHER THE STATE HAS DISCRIMINATED AGAINST ANY PARTICULAR ENTERPRISE IS NOT RELEVANT TO THE QUESTION OF THE EXISTENCE OF ITS POWERS

The Petitioner suggests that some showing must be made that a state regulation of commerce actually puts an enterprise at a disadvantage before a court can say that the state regulation exceeds that state's powers.

The Respondents' response, and the Appellate Court's opinion, do not rest on anything so temporary. They deal with the power of Congress to regulate interstate and foreign commerce and a state's action which does that which Congress is empowered to do.

There is no question that the commerce clause (Art. I, §8, Cl. 3) does not eclipse the power of the states to levy taxes. But it does limit their ability to use their taxing power so as to regulate commerce (Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 50 L. Ed. 2d 514, 97 S. Ct. 599 (1977).

It is not the effect on one enterprise or another which is the test of whether a state has regulated beyond its power, but the effect on Congress' power. Revenue and Taxation Code §225 reduces the effect of Congressional tariffs. That is the question. If the statute is

allowed to stand because no showing was made in this case that Sears' televisions were put in an advantageous position compared to some other companies, Congress' power to regulate the difference between foreign and domestic goods would still be less because of the statute.

This Court has already rejected the idea that discrimination makes any difference when considering a State's power to tax (Japan Line Ltd v. County of Los Angeles, supra, Slip Opin. p. 22).

E. THE 3% DIFFERENTIAL IS NOT INSIGNIFICANT

The Petitioner claims that the opinion of the court below requires meticulous equality between types of interstate commerce. But the 3-3½% rate of tax in effect between 1976 and 1978 cannot be viewed as insignificant. For the goods taxed, the 3% differential corresponds exactly to the annual shifts in tariffs on CB radios imposed by the President pursuant to the Tariff Act of 1974 (see Wall Street Journal of March 29, 1978, supra).

In fact, equality is required of the States. The commerce clause does not prohibit state taxation, but it does prohibit state regulation of commerce, particularly where the same kind of regulation has already been completely undertaken by Congress. The States have no power to adjust the tariff schedule made by Congress and the President.

In retaining uniformity of treatment of the various sorts of commerce, the Court of Appeal has retained the ability of the Federal Government to differentiate, i.e., to regulate. It is when the States are permitted to benefit one form of commerce at the expense of another that Congress is forced to consider the States' forms of taxation. If the States retain uniformity, Congress can regulate, knowing that the distinctions it creates will have their full impact.

Respectfully submitted,

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§ 253.10 Method of claiming transshipment exemption

A person claiming the transshipment exemption under Section 225 may either claim this exemption by (1) a percentage method of determining property held for transshipment on hand at a particular location by allocating a portion of the total inventory, using the percentage determined by dividing the total out-of-state shipments by the taxpayer from that location during the preceding year by the total of such shipments from that location during such year, or (2) an actual method as evidenced by contracts of sale in existence on the tax lien date, and a full, true and correct inventory of all property held for transshipment together with the date of receipt of the same, the date of withdrawal of the same, the point of origin thereof, and the point of ultimate destination thereof.

Transshipment exemption claimants shall submit to the assessor annually an affidavit, giving any information required by the board.

(Added by Stats.1977, c. 246, p. —, § 7.)

Derivation: Former § 225.1, added by Stats.1975, c. 1126, p. 2746, § 2.

Library References
Taxation ⇨101.
C.J.S. Taxation §§ 115, 120.

Asterisks * * * indicate deletions by amendment

§ 233. Exemptions; imports from foreign countries; opening containers; effect

(a) For the purpose of taxation of goods imported from foreign countries in containers the opening of such containers shall not necessarily, in itself, result in the loss of immunity for such goods to which it is entitled * * * under the United States Constitution.

(b) The immunity from taxation of goods imported from foreign countries shall not be lost when a container is opened for the following purposes:

(1) To inspect the contents of such container.

(2) To remove the goods belonging to two or more importers for delivery to them.

(3) To remove the goods solely for storage by the importer.

(4) To remove the goods to divert them to separate outlets of the importer in interior states.

(c) The circumstances in which opening a container shall not result in the loss of immunity from taxation is not limited to the list contained in subdivision (b).

(d) For the purposes of this section, the term "containers" is defined in Section 232.

(Added by Stats.1975, c. 748, p. 1747, § 1. Amended by Stats.1977, c. 246, p. —, § 5.)

APPENDIX "C"

SENATE BILL No. 940

Introduced by Senator Marks

March 27, 1979

An act to repeal and add Section 225 of the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SB 940, as introduced, Marks. Property taxation: goods in commerce.

Under the existing Constitution of the United States, the states are prohibited, without the consent of Congress, from laying any imports or duties on imports or exports, except as may be absolutely necessary for executing their inspection laws. The Supreme Court of the United States, in Brown v. Maryland, 6 L.Ed. 419, held, in effect, that such prohibition precluded the imposition of state excise taxes on importers while goods remained in their "original package," and such court, in Low v. Austin, 20 L.Ed. 517, later extended the "original package" doctrine to grant immunity to imported goods in their original packages from ad valorem property taxes. On January 14, 1976, the Supreme Court of the United States overruled Low v. Austin and held, in Michelin Tire Corporation v. Wages, 46 L.Ed. 2d 495, that the imposition of nondiscriminatory property taxes on imports are not precluded by the Import-Export Clause of the Constitution of the United States.

Prior to the adoption of the Michelin case, in Chapter 1125 of the Statutes of 1975, the Legislature, pursuant to the independent power granted to it to classify and exempt personal property for purposes of property taxation by Section 2 of Article XIII of the California Constitution, added Section 225 to the Revenue and Taxation Code to exempt certain property in foreign commerce, whether or not such property remained in the original package. In Zee Toys, Inc.,

v. County of Los Angeles, 85 Cal.App.3d 763, on October 25, 1978, the California Court of Appeals held Section 225 to be an invalid attempt to regulate interstate and foreign commerce by the selective exemption for goods in foreign trade, while granting no such exemption for goods in interstate commerce.

This bill proposes to grant the same exemption as the one before the court in the Zee Toys case, except that such exemption would apply to goods in both foreign and interstate commerce.

The bill would also require the State Controller to report to the Legislature on the amount of claims made by county auditors for reimbursement for property tax revenues lost by reason of the exemption of property as proposed by the bill.

Vote: ⅔. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 225 of the Revenue and Taxation Code is repealed.

~~225. Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.~~

SEC. 2. Section 225 is added to the Revenue and Taxation Code, to read:

225. Personal property manufactured or produced outside this state and brought into this state for transshipment outside the state for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption provided for in this section shall not apply to personal property in the manufacturing process or in

production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.

SEC. 3. The State Controller shall report to the Legislature on the amount of the claims made by county auditors under Section 16113 of the Government Code for compensation for property tax revenues lost by reason of the exemption of property by this act. Such report shall be made on or before the first day of October next following the operative date of this act, in order that the Legislature may appropriate funds for the subventions required by Section 2229 of the Revenue and Taxation Code.

O